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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN KAYE, Individually and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,
Petitioners,
v.

BARBARA COLEMAN,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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POINT I

THE MOTION BY THE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AMICUS CURIAE SHOULD BE DENIED

This brief is submitted on behalf of respondent Barbara Coleman pursuant to Supreme Court Rule 37(5) in opposition to the motion of the New Jersey Association of Counties ("Association") for leave to file an *amicus curiae* brief in the instant matter. As discussed below, the motion for leave to file an amicus brief simply raises the very same issues and states the same position that has been extensively briefed by both respondents. The Court of Appeals presumably recognized that fact when, after considering the Association's arguments in support of the petitioner's motion for a rehearing and suggestion for a rehearing *en banc*, nevertheless denied the motion. The Association's motion for leave to file amicus simply imposes an unnecessary burden on the Court and will needlessly require the Court to expend its valuable judicial resources. Moreover, as discussed in respondent's opposition brief, there is an independent basis for the decision of the Court of Appeals in the case at bar, finding the County of Monmouth liable for the acts of Prosecutor Kaye. In the event that the Court is inclined to consider the Association's motion, respondent respectfully requests the Court to consider this submission which nevertheless dictates that the Association's motion be denied.

POINT II

THE COURT OF APPEALS PROPERLY APPLIED PREVAILING STATE LAW IN REACHING ITS DETERMINATION AND DID NOT VIOLATE THE PRINCIPLES IN ERIE R.R V. TOMKINS

The Association seeks to join in the arguments raised by petitioners that the County should not be liable for the acts of County Prosecutor John Kaye, in the case at bar. In doing so, the Association relies upon the very same argument raised by petitioners (i.e., that the Court of Appeals allegedly violated the principles in *Erie R.R. v. Tomkins*, 304 *U.S.* 64 (1938) by failing to apply the principles established by the Supreme Court of New Jersey in *Lehmann v. Toys 'R Us*, 626 *A.*2d 445 (N.J. 1993) in analyzing the County's liability in the case at bar). However, as explained in respondent's opposition brief and as discussed more fully below, even a cursory reading of the decision of the Court of Appeals reveals that the Court of Appeals did anything ***but*** ignore the decision in *Lehmann.* Rather, the Court of Appeals recognized that in *Lehmann*, the New Jersey Supreme Court set forth the applicable standard to determine whether an employer can be held liable under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.* ("LAD") when an employee raises a hostile work environment, sexual harassment claim against a supervisor. Rather, the court properly found that the New Jersey Supreme Court expressly held this issue open in *Cashen v. Spann*, 66 *N.J.* 541, 324 *A.*2d 81, *cert. denied*, 423 *U.S.* 829 (1975) and then followed New Jersey law in holding that liability was properly imposed upon the County in the case at bar.

The Association recognizes that the agency analysis set forth in *Lehmann* has never been extended by the Supreme Court of New Jersey to apply to cases involving a public employer and specifically to cases involving liability of a county for the acts of a county prosecutor. Certainly, nowhere in the decision in *Lehmann* did the New Jersey Supreme court ever suggest, let alone require, that its agency principles be extended to cases involving liability of a public entity, such a County, for the acts of a county prosecutor.

By contrast, the Association ignores the long line of New Jersey case law followed by the Court of Appeals, that specifically discusses the status of a County Prosecutor and dictates that the County was properly found to be liable for the discriminatory employment decisions of County Prosecutor John Kaye. The Court of Appeals properly relied upon the established case law holding that notwithstanding the fact that a county prosecutor in New Jersey is an independent constitutional officer, the County is properly subject to liability when he acts outside of the scope of his traditional law enforcement duties.

In *Morss v. Forbes*, 24 *N.J.* 341, 132 A.2d 1 (N.J. 1957), the Supreme Court of New Jersey analyzed the role that the county prosecutor plays in New Jersey governmental structure. In doing so, the Court noted that the county prosecutor is a *local official* subject to *county control* and *not* a state official subject to the control of the attorney general. *Id.* at 372. In defining the role that the prosecutor plays in local government, the court in *Morss* agreed that the "prosecutor enjoys a rather unique status with respect to the traditional decision of responsibilities between the executive branch and the Legislature...." *Id.* at 363.

The court found that by provision of the Constitution of 1947, both the attorney general and the county prosecutor are constitutional officers. *Id.* However, while the attorney general, as head of the Department of Law and Public Safety, is within the executive department (Art V., Sec. II, par. 3), the provision for the appointment of prosecutors is found in Art. VII, Sec. ii, par. 1, "Public Officers and Employees." *Id.* Noting that county "prosecutors receive their remuneration from the *county*," the court concluded that the prosecutor is "primarily a local official" and that "[t]here is no equality in statute or dignity with the Legislature." *Id.* at 372.

In *In re Investigation Regarding Ringwood Fact Finding Comm.*, 65 *N.J.* 512, 324 *A.*2d 1, 5-15 (N.J. 1974), The New Jersey Supreme Court held that the county prosecutor was *not* to be considered an executive officer with the privilege to withhold information from the Legislature. *Id.* at 530. In doing so, the court cited *Morss* and found that "although there is still some confusion with respect to the exact status of the prosecutor, there is 'little doubt but that the executive chain of command is *not* sufficiently prominent to enable the prosecutor to claim any high prerogative which might be enjoyed by the state executive with respect to withholding information from the Legislature.'" *Id.* at 519 (emphasis added).

In *Cashen v. Spann*, the New Jersey Supreme Court found that the County Prosecutor was to be considered a state agent where the alleged tortious conduct arose out of the performance of his duties while investigating criminal acts. However, as recognized by the Court of Appeals in the case at bar, the court in *Cashen* was careful to ensure that its holding would not be read too broadly, expressly refusing to decide

whether the prosecutor or his detectives were to be considered state or county employees for other purposes. (Pet. App. 10) The court stated as follows:

> We wish to make it clear ... that our resolution of this issue is limited to the factual circumstances here presented. We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

Coleman v. Kaye, 87 *F.*3d 1491 (1996) (*quoting Cashen v. Spann,* 66 *N.J.* 541, 552, *cert. denied*, 423 *U.S.* 829 (1975) In doing so, the court noted that "Justice O'Connor warned lower courts to be wary of 'egregious attempts by local governments to insulate themselves from liability for unconstitutional policies.'" (*quoting Cashen*, 66 *N.J.* at 127)

In the companion case of *Dunne v. Fireman's Fund American Insurance Company*, 69 *N.J.* 244, 250, 353 *A.*2d 508 (1976), the court addressed whether the county's insurer was required to pay to defend the suit at issue in *Cashen*, under the terms of its policy with the county. Although the court had previously held that county was not vicariously liable for the alleged acts of the defendant in the case, the court concluded that the insurance policy required the insurer to defend the suit. In doing so, the court recognized an employer/employee relationship between detectives of the prosecutor's office and the county. *Dunne*, 69 *N.J.* at 250-251.

The issue addressed by the Court of Appeals in the case at bar regarding the County's liability under state law was specifically addressed by the Honorable John W. Bissell, U.S.D.J., in an Opinion issued on January 5, 1990, in the case of *Knodel v. the*

Office of the Union County Prosecutor, et al., Civil Action No. 89-2470, United States District Court for the District of New Jersey. (Pet. App. 20) In that case, the plaintiff alleged various unlawful employment practices by his employer, the Union County Prosecutor's Office. Plaintiff asserted claims under both state discrimination laws, as well as federal statutory and constitutional claims. The defendant, County of Union, filed a motion to dismiss the complaint, asserting that Knodel, as an employee of the Union County Prosecutor's Office, and not the County of Union, cannot properly maintain an action against it. The County argued that the Prosecutor's Office is an independent *state* agency that is not controlled by the county government and that, therefore, plaintiff was not a county employee. (Pet. App. 24)

In denying the County's motion, the court examined New Jersey cases discussing the relationship between the prosecutor's office and the county. In discussing the decisions in *Cashen* and *Dunne*, the court found that the New Jersey Supreme Court recognized the dual capacity of employees of the prosecutor's office as both state agents and county employees depending upon the situation. (Pet App. 29-32) The court found that the cases "demonstrate the relationship between the prosecutor and the county." The court recognized that

> [t]he county has the initial responsibility for appropriating the annual budget for the prosecutor's office. Realizing the important role vested with the prosecutor, the legislature provided an additional procedure to obtain funds in excess of the budget by obtaining an order from the assignment judge. This procedure clearly demonstrates the necessity of including the County of Union as a defendant in this action.

(Pet. App. 32)

The court concluded that "plaintiff Knodel has clearly advanced allegations which could lead to the relief he seeks. The fact that county prosecutors' offices have more autonomy from county government structure than other county offices does not mean that the county is free from liability." (Pet. App. 26) *See also, Giuffre v. Bissell*, United States District Court for the District of New Jersey, Civil Action No. 92-2014 (Pet. App. 4) (finding that "[u]nlike the prosecutor in *Cashen* whose abuses arose from actions which fell squarely within the traditional role of a prosecutor, defendant Bissell is alleged to have engaged in more expansive misconduct extending well beyond the reach of his office.")(Pet. App. 18)

As in the cases discussed above, the discriminatory acts committed by Prosecutor John Kaye constituted misconduct that extends beyond the prosecutor's traditional role of law enforcement. Both the New Jersey courts, as well as the District Court of New Jersey, support the finding of the Court of Appeals that the county is liable for the acts of the county prosecutor in this context.

Under the Association's theory, the prosecutor's authority and discretion in making personnel decisions constitutes a license to commit unlawful discrimination without a remedy by the people he or she supervises against their employer. The Association's reliance upon certain decisions finding that, in some circumstances, a County is unable to control the prosecutor's personnel decisions, is misplaced.

For instance, the decision in *In re Middlesex County Prosecutor*, 605 A.2d 265, 255 *N.J. Super.* 333 (App. Div. 1992) does not stand for the proposition that the county could not or would not be liable for the unlawful acts of employment discrimination committed by the county prosecutor. Rather, the court simply upheld an agency

finding that the prosecutor himself was guilty of an unfair labor practice. Significantly, the only claim asserted was against the prosecutor himself and no claim was made against the county. Moreover, in *Middlesex*, the County was attempting to distance itself from the decisions of the County Prosecutor as it related to the County's authority to engage in collective negotiations under the New Jersey Employee Relations Act. By contrast, counties have recognized their potential liability for acts of employment discrimination committed by the county prosecutor as evidenced by the County's continuing commitment to indemnify and defend Kaye in the case at bar. The other cases cited by the Association included a decision of the Law Division which is of no precedential value and merely dealt with issues relating to whether the County was an employer for purposes of a residency requirement (*CWA v. Treffinger*, 677 *A*.2d 295, 291 *N.J. Super.* 376 (Law Div. 1996) and a case involving a challenge to a reorganization plan that created supervisory officer positions with the unclassified civil service of the Prosecutor's investigative staff. (*Zamboni v. Stamler*, 199 *N.J. Super.* 378, 489 *A*.2d 1169 (App. Div. 1985)).

Further, contrary to the assertion of the Association, imposing liability upon the County does further the purpose of the LAD. The term "employer" under the LAD was amended in 1977 to specifically include "all public officers, agencies, boards or bodies." *N.J.S.A.* 10:5-5(e). The Act also expressly defines a public entity to include a "public authority, public agency, and any other political subdivision or public body of the State." *N.J.S.A.* 10:5-5(e). Thus, the LAD recognizes that the County of Monmouth, as plaintiff's employer and as a public entity, bears liability for the acts of John Kaye and its agents. Further, providing an incentive for employers to impose prospective measures to

prevent further discrimination and harassment in the workplace is not the only purpose served by holding an employer liable for the acts of discrimination committed by its agents. Equally as important, if not more, is the policy of providing a remedy for employers and a means of redress for unlawful discriminatory action by the employer that have harmed them. The decision of the Court of Appeals does indeed further the remedial purpose of the LAD by providing a remedy for employees of the county prosecutor's office, such as Ms. Coleman, against their employer, the County of Monmouth. *See Fuchilla v. Layman*, 109 *N.J.* 319, 335, 537 *A.*2d 652 (N.J. 1988) (the LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's growing interest in a discrimination-free workplace)

The Court of Appeals, in finding that the Supreme Court of New Jersey would impose liability on the County for the acts of the County Prosecutor, recognized that the County's argument would have far reaching implications that contravene both the express language and the public policy behind the New Jersey LAD. A finding that the County could not be held liable for the acts of John Kaye and or his subordinates under *respondeat superior*, would effectively preclude plaintiff from pursuing an action under the LAD against her employer, the County of Monmouth, for the discriminatory actions of her employer and its agents.

POINT III

THE ASSOCIATION'S ARGUMENT IGNORES THE FACT THAT THE COUNTY IS ALSO LIABLE FOR THE ACTS OF JOHN KAYE'S SUBORDINATES

It is also critical to recognize that the jury verdict against the County of Monmouth was not based upon the acts of John Kaye alone. Rather, the jury found that the County was liable for the acts of John Kaye "*and/or one or more of his subordinates.*" Thus, notwithstanding the Association's argument that Kaye, as county prosecutor is a constitutional officer, the same cannot be said of his subordinates, including assistant prosecutors and investigators.

Even under the Association's argument, assistant prosecutors do not share the same status as the county prosecutor. Assistant prosecutors are hired on the local level as county employees. Certainly, for purposes of a master-agent relationship, assistant prosecutors *must* be considered to be agents of the County. The testimony at trial supports the jury's finding of liability against the county for the acts of John Kaye's subordinates. The evidence established that Assistant Prosecutors William Guidry, Robert Hoenecker and Alton Kenney had direct supervisory powers over investigators of the MCPO and participated in the decision not to promote plaintiff.

Even if assistant prosecutors may have some, albeit an attenuated, relationship to the prosecutor himself, *detectives* of the Monmouth County Prosecutor's Office certainly have no such relationship. Detectives are strictly employees of the county and stand in a master servant relationship with the County. In interpreting the liability of prosecutors under the Tort Claims Act, the New Jersey Courts have recognized a distinction between the acts of

the prosecutor as opposed to investigators employed by the prosecutor's office. *See Hayes v. County of Mercer*, 217 *N.J. Super.* 614 (App. Div. 1987)

The testimony at trial supports a finding of liability against the county based upon the acts of subordinate agents of the MCPO. For instance, the evidence at trial established that Chief Frank R. Licitra was involved in the plaintiff's failure to be promoted in 1989. Plaintiff testified that she asked Chief Licitra why she had been passed over for a promotion and that Chief Licitra stated "it's worse than that, you weren't even considered." Plaintiff also testified that she prepared and delivered a memorandum to Chief Licitra to Prosecutor Kaye regarding her failure to be promoted.

With respect to plaintiff's failure to receive a promotion in May and October 1990, the evidence at trial established that Robert Giaconne received the promotion because the defendant agents of the MCPO believed that he "had a psychological need" for the position. With respect to the plaintiff's failure to receive the promotion in October 1990, defendant agents of the MCPO participated in the decision to offer the position to Philip George, a male investigator with less experience and seniority than plaintiff.

The evidence also established that the evaluation process used by agents of the MCPO in selecting the individuals who were promoted was used to discriminate against the plaintiff as a result of her gender by giving her lower ratings than less qualified males. Additionally, at trial plaintiff produced evidence that the procedures used by agents of the MCPO in making promotions were changed in April 1990 in an effort to disqualify plaintiff from being considered for a future promotion.

Based upon the forgoing, the jury specifically found that John Kaye and/or one *or more of his subordinates* committed discrimination by failing to promote plaintiff in May

1989, June 1990 and October 1990. Thus, in addition to the jury's finding that John Kaye intentionally discriminated against the plaintiff, the jury also found that his subordinates, agents of the MCPO, committed discrimination against the plaintiff rendering the County liable under respondeat superior.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Association's motion to file amicus curiae should be denied.

Respectfully submitted,

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